Filed 6/29/10 In re A.H. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re A.H., a Person Coming Under the Juvenile Court Law.	C061707, C063166
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. C.M., Defendant and Appellant.	(Super. Ct. No. JD228079)

In case No. C061707, C.M., the maternal great-grandfather and guardian of the person of 15-year-old A.H., appeals from a March 13, 2009 order of the Sacramento County Juvenile Court adjudging A.H. a dependent child of the court and placing him with a maternal aunt, K.M.[1] In case No. C063166, great-grandfather appeals from an August 28, 2009 order continuing a prepermanency hearing.[2]

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[1] Great-grandfather appears in propria persona on appeal.

[2] On our own motion, we ordered the two appeals consolidated.

On appeal, great-grandfather contends the evidence was insufficient to support the juvenile court's jurisdictional and dispositional orders. Great-grandfather also contends the court failed to appoint counsel for him at an initial hearing; his counsel, once appointed, rendered ineffective assistance; and the juvenile court abused its discretion when it failed to continue the proceedings to allow an essential witness to testify. We shall affirm the jurisdictional findings and dispositional orders of the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND[3]

In 1995, when A.H. was about three months old, his half sister was killed in a car crash and his mother was awarded $1 million dollars in damages. When A.H. was three years old, his mother was murdered by a boyfriend who evidently sought control of "a large medical settlement" related to the deceased sister.

Professional Conservator and private fiduciary Lisa Berg has been the guardian of A.H.'s estate since 2001, and, as such, she manages his large inheritance from his mother's estate. Other professionals involved with A.H. have questioned whether anyone in his family has his best interests at heart.

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[3] Great-grandfather's reply brief in case No. C061707 contains references to an "augmentation of the record per [California Rules of Court, rule] 8.340, filed March 19, 2010." On that date, great-grandfather filed a *motion* to augment the appellate record with the materials discussed in the brief. However, the motion was denied on March 29, 2010. References in the brief to those materials will be disregarded.

The appellate record does not contain any Letters of Guardianship issued to great-grandfather; however, it is undisputed that he has been involved in A.H.'s life for about 10 years and that he was the guardian of A.H.'s person when this case commenced in August 2008. It has been reported that, at times, great-grandfather failed to provide for A.H.'s food and clothing although great-grandfather receives a monthly stipend for A.H.'s care.

Great-grandfather owned two homes in Sacramento. One house was unoccupied, and the other was great-grandfather's residence. Sometime during the previous five years, A.H.'s room at great-grandfather's residence had been damaged in a wind storm and required renovation that was not complete at the time of the March 2009 jurisdictional hearing.

From 2005 through June 2008, A.H. lived with a succession of four different friends and family members. Great-grandfather continued to provide for him financially. When A.H. returned to great-grandfather's residence in July 2008, A.H. lived in a trailer next to the house because the house purportedly "wasn't in good living condition." However, A.H. did not see the inside of the house and could not confirm whether that was so.

The trailer had little heat and no air conditioning, running water, refrigerator, shower, or working bathroom.[4] A.H.

[4] A.H. told the social worker that the trailer had no working bathroom. At the hearing, A.H. testified that there was a

"use[d] the bathroom" outside the trailer, and he showered at his aunt's house on weekends.

One day after A.H. had resided in the trailer for a month, great-grandfather yelled at him, put him in a chokehold, and threatened to hit him with a two-by-four. As a result, A.H. ran away to his grandmother's residence.

At one point, great-grandfather denied that A.H. had been living in the trailer without running water, adequate heating, or adequate food supply. However, at another point, he conceded that A.H. was "living in the trailer" and that he "could have stayed there." Great-grandfather later claimed that the trailer was "in good shape" and that it was "nice."

A.H. came to the attention of the Sacramento County Department of Health and Human Services (DHHS) in August 2008 after he left the trailer, went to his grandmother's house, and told her what had been happening. The grandmother became concerned and called DHHS and law enforcement regarding A.H.'s circumstances with great-grandfather. Law enforcement returned A.H. to great-grandfather's residence but, upon examining the living conditions, concluded they were not suitable and brought A.H. to the Children's Receiving Home.

On August 19, 2008, DHHS filed a petition alleging that A.H. came within the provisions of Welfare and Institutions Code

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bathroom, but he did not use it. He claimed not to know whether the bathroom worked.

section 300[5] due to serious physical harm, failure to protect, and cruelty. (§ 300, subds. (a), (b), & (i).)

On August 19, 2008, a letter listing the time, date, and location of the initial hearing was hand-delivered to great-grandfather's residence. Great-grandfather was not present and did not receive the letter. The initial hearing took place the next day, with great-grandfather not present. The minor was detained and placed with his father, A.H., Sr. In an ensuing interview with a social worker, great-grandfather explained that he recently had moved away from the residence where the notice had been delivered.

Great-grandfather appeared at the prejurisdiction status conference on November 3, 2008, and counsel was appointed for him at that time.

A contested jurisdictional and dispositional hearing took place from March 10 to March 13, 2009. At two different times during the hearing, great-grandfather testified that he was not seeking placement of A.H.

At the conclusion of the hearing, counsel for DHHS stated, "based on the evidence before the Court I do not think disposition is contested. I don't want to go out on a limb here, but the testimony of [great-grandfather] was that as we sit here today he does not want [A.H.] in his care."

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[5] Undesignated statutory references are to the Welfare and Institutions Code.

Great-grandfather's counsel stated: "It's my client's request at this time that the Court dismiss all of the allegations and allow him to make the appropriate decisions regarding where the appropriate place for [A.H.] to live is. If the court were inclined to sustain any or all of the allegations my client is submitting as to disposition. He has testified that currently he's not asking for [A.H.] to be returned to his care given [A.H.'s] current behaviors. So I would be a submit as to disposition should we get to that phase."

In its ruling on March 13, 2009, the juvenile court dismissed the cruelty and serious physical harm allegations for insufficient evidence. The court amended the failure to protect allegation to conform to proof and sustained it by a preponderance of evidence. The court adjudged A.H. a dependent, removed him from great-grandfather's care, placed him with a maternal aunt, and ordered reunification services for great-grandfather.[6]

DISCUSSION

I

Great-grandfather contends the evidence at the jurisdictional hearing was insufficient to demonstrate that A.H.

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[6] The biological father was not requesting services or custody of the child. He is not a party to this appeal. In his briefing, great-grandfather makes no claim of error with respect to the order continuing the prepermanency hearing. It is not necessary to set forth the factual and procedural background of that order.

was at risk of substantial physical harm or illness. We are not persuaded.

"In reviewing the sufficiency of the evidence on appeal, we look to the entire record to determine whether there is substantial evidence to support the findings of the juvenile court. We do not pass judgment on the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Rather, we draw all reasonable inferences in support of the findings, view the record in the light most favorable to the juvenile court's order, and affirm the order even if there is other evidence that would support a contrary finding. [Citation.] When the [juvenile] court makes findings by the elevated standard of clear and convincing evidence, the substantial evidence test remains the standard of review on appeal. [Citation.] The appellant has the burden of showing that there is no evidence of a sufficiently substantial nature to support the order." (*In re Cole C.* (2009) 174 Cal.App.4th 900, 915-916.)

"Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) The pivotal question under section 300 is whether circumstances *at the time of the jurisdictional hearing* subject the child to the defined risk of harm. (*Id.* at p. 824.)

In this case, the substandard conditions in which A.H. had lived during July and August 2008 exposed him to a substantial risk of serious physical harm or illness. The trailer had no running water or working bathroom or shower, inadequate heat, no air conditioning, and no refrigerator. A.H. had to "go to the bathroom" outdoors and shower at his aunt's house on weekends. There was insufficient food and the child often was hungry. In addition, there was evidence that great-grandfather had lost patience with A.H., and that their relationship had been intense and contentious. This evidence supported an inference that A.H. had been banished to the trailer.

Thus, there was substantial evidence that A.H. faced a substantial risk of serious physical harm or illness resulting from the lack of food and the unsanitary conditions in the trailer. (*In re Rocco M.*, *supra*, 1 Cal.App.4th at pp. 823-824.)

To the extent great-grandfather may be understood to contend that there was insufficient evidence of physical abuse, the contention is irrelevant because the juvenile court did not sustain the physical abuse allegation.

II

Great-grandfather contends the evidence "does not rise to clear and convincing evidence to remove the child from [great-grandfather's] custody."

DHHS responds that great-grandfather has forfeited any objection to the court's dispositional order by failing to object in the juvenile court. As noted, great-grandfather

testified that he was not seeking placement of A.H. with him, and he submitted to DHHS's recommendation to place the child with the aunt. The juvenile court could have addressed any perceived procedural error had the issue been raised. (E.g., *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339.)

In any event, there was substantial evidence supporting the child's removal from great-grandfather's care.

To support an order removing a child from parental custody, the court must find clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subds. (c)(1).) The court must also "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor" and "state the facts on which the decision to remove the minor is based." (§ 361, subd. (d).)

Great-grandfather's claim of evidentiary insufficiency is confined to the issue of physical abuse, which the juvenile court dismissed at the jurisdictional hearing. Notwithstanding his citations of "section 300(b)," his factual assertions involve "allegations of [physical] abuse [that] happened more than five years [ago] and have not happened since that time."

Any insufficiency of evidence with respect to physical abuse does not undermine the court's dispositional order.

There was evidence that, after great-grandfather's house was damaged in 2005, he exposed A.H. to a transient lifestyle in which A.H. resided with a series of friends and relatives. Then, when A.H. returned to great-grandfather's residence, he lived in a trailer under substandard conditions including no running water, insufficient heat, no air conditioning, and no refrigerator. The trailer was uncomfortable; the food supply was inadequate and A.H. often was hungry. There was no evidence that the damaged house had been repaired or that any reasonable effort could have remedied the substandard and unsanitary living conditions in the trailer.

Moreover, the evidence showed that great-grandfather had lost patience with A.H. and that he was extremely strict, thereby causing conflicts in their relationship that led to physical struggles. No evidence suggested that any intervention short of removal of A.H. would have protected him from further conflict. The court's dispositional order is supported by substantial evidence. (*In re Cole C.*, *supra*, 174 Cal.App.4th at pp. 915-916.)

III

Great-grandfather contends he was entitled to counsel at the initial hearing. The contention has no merit.

As noted, DHHS filed its dependency petition on August 19, 2008. That same day, a letter listing the time, date, and

location of the initial hearing was hand-delivered to great-grandfather's residence. The initial hearing took place the next day, with great-grandfather not present. In an ensuing interview with a social worker, great-grandfather explained that he recently had moved away from the residence where the notice had been delivered.

Great-grandfather appeared at the prejurisdiction status conference on November 3, 2008, and counsel was appointed for him at that time.

Section 317, subdivision (a)(1) provides: "When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section." Subdivision (b) of this section provides: "When it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel for the parent or guardian, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section."

Thus, the juvenile court is required to appoint counsel for the guardian of a child only if it appears to the court that the guardian is "presently financially unable to afford and cannot for that reason employ counsel." (§ 317, subd. (b).) Because

great-grandfather was not before the court at the initial hearing, and his financial situation was not otherwise made known to the court, it could not have appeared to the court that great-grandfather was financially unable to employ counsel.

In his opening brief, great-grandfather did not contend that DHHS could or should have known that he had established a new residence shortly before the initial hearing. However, in his reply brief great-grandfather claims DHHS should have ascertained his whereabouts by asking A.H. for great-grandfather's telephone number and then inquiring of great-grandfather about his current address. The claim, asserted for the first time in the reply brief, is untimely. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055.) Thus, great-grandfather has not shown any inadequacy in DHHS's efforts to notify him of the proceeding.[7] Because great-grandfather never indicated or communicated a desire for counsel before the initial hearing, no statutory or constitutional due process violation occurred. (*In re Ebony W.* (1996) 47 Cal.App.4th 1643, 1648; see *In re Angela R.* (1989) 212 Cal.App.3d 257, 276.)

In any event, counsel was appointed for great-grandfather at the first hearing at which he appeared. He has not shown any

[7] Contrary to the argument of DHHS, great-grandfather never admitted that his new address "did not belong to him but was the home of 'Sister Kelly.'" He simply acknowledged that "Sister Kelly" resided at that address.

prejudice from the lack of an earlier appointment. Reversal is not required.[8]

IV

Great-grandfather contends his counsel rendered deficient performance by failing to call several witnesses to testify at trial. We are not convinced.

Great-grandfather submitted a witness list that disclosed 11 witnesses. Great-grandfather testified, and he called A.H. as a witness. All other individuals named on the witness list, except Pastor Gary Johns, were dismissed as witnesses by great-grandfather's counsel following her consultation with great-grandfather. Thus, those individuals were allowed to be present in the courtroom during the hearing. Near the end of the hearing, great-grandfather's counsel consulted with him about further witnesses, and Pastor Johns was the only further witness he requested.

"'"[I]n order to demonstrate ineffective assistance of counsel, [the appellant] must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof.

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[8] In his reply brief in case No. C061707, great-grandfather appears to contend that his counsel was not present at the *disposition hearing*. The record refutes this contention. As noted, great-grandfather's counsel submitted on the issue of disposition, should the hearing progress to that phase.

[Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" [Citation.]'" (*People v. Avena* (1996) 13 Cal.4th 394, 418.)

"'"[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

In this case, there could be a satisfactory explanation for counsel's failure to call certain individuals listed on his witness list. Counsel consulted with great-grandfather during the hearing and they decided together *not* to call them. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.)

Great-grandfather's counsel asked the juvenile court for a continuance to call Pastor Johns and made an offer of proof of the expected testimony. The court found that Pastor Johns's testimony regarding great-grandfather's character and his treatment of A.H. would unduly delay the trial and would be cumulative in that there was a letter to the same effect from Pastor Johns already in evidence. Counsel entered an objection to this ruling. Thus, counsel acted competently and did not render a deficient performance with respect to Pastor Johns.

Moreover, in light of the court's comments regarding testimony from Pastor Johns, it is not reasonably probable that calling additional witnesses would have resulted in a determination more favorable to great-grandfather. (*People v. Avena*, *supra*, 13 Cal.4th at p. 418.)

Great-grandfather claims his counsel rendered deficient performance by failing to present evidence from school teachers to the effect that A.H. "came to school clean always and not dirty and smelly." Great-grandfather has not shown that this evidence was available at the hearing; and its unavailability would be a satisfactory explanation for its omission.

Great-grandfather next claims his counsel rendered deficient performance by failing to "cross-examin[e]" one or more witnesses who had claimed to have seen him "choke the child." However, no such testimony was presented at the hearing, and no opportunity for cross-examination existed.

Great-grandfather lastly claims his counsel was ineffective for having failed to object to the "reasonableness of the services provided for reunification with" A.H. However, great-grandfather does not explain the nature of the ordered services or the basis on which counsel could have objected that they were unreasonable. The claim fails for lack of explication.

V

Great-grandfather contends the juvenile court abused its discretion when it denied him a continuance to present the testimony of Pastor Johns. He argues "the court erred when it

denied a continuance for a witness that had been available over the months and had an emergency during the time needed." We disagree.

As noted, the court ruled that the value of live testimony from the pastor was outweighed by the harm that would be caused by further delay of the proceedings. (See part IV, *ante*.) Such a decision is well within the bounds of reason and is not arbitrary, capricious, or patently absurd. Thus, this court has no authority to substitute its decision for that of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

DISPOSITION

The jurisdictional findings and dispositional orders of the juvenile court are affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

ROBIE, J.